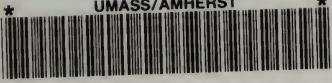


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A Guide For Records Requesters

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Access To Public Records

ACCESS TO PUBLIC RECORDS: A Guide for Records Requesters

The policy that governmental activities should be open to public scrutiny has existed in Massachusetts for more than a century. In 1892, the Legislature created the position of Commissioner of Public Records, the forerunner of today's Supervisor of Public Records. Five years later, a definition of public records was added to the law, as was the provision applying the public records law to state, county and municipal governments.

These early statutes limited public records to those documents legally required to be made or received by a government agency. It was not until 1973 that new legislation provided that all records be available to the public, unless specifically exempted by law. Then, in 1977, the law was further amended, imposing certain time constraints on records custodians (keepers) when making records available for examination. This same amendment provided remedies for records requesters when access is denied, by referring appeals of such denials to the Supervisor of Public Records. Under the appeals process, the Supervisor is empowered to determine whether the records are public and if so determined, to order their disclosure.

The Division of Public Records has published this booklet to explain the provisions of the law and to assist records requesters in exercising their right to access. Both the Supervisor of Public Records and the Division of Public Records organizationally come under the office of the Massachusetts Secretary of State. However, the Supervisor's responsibilities are defined by law and therefore are carried out independently. The duties and responsibilities of a records custodian are also detailed in the Massachusetts General Laws.

Public Records are defined in G.L. Chapter 4, Section 7, Clause 26; the public access to records, including the alternatives available to requesters if access is denied, is covered in G.L. Chapter 66, Section 10.

A custodian or keeper of public records has a legal responsibility, upon request, to make the records under his control accessible to the public. A custodian may deny access to records, only if he can state a specific statutory exemption(s) which would justify the denial of disclosure. Additionally, a records custodian must provide appropriate, detailed reasons for claiming a specific exemption.

All records are considered public unless specifically exempted by law. Therefore, appeals brought to the Supervisor of Public Records are determined on the basis of whether or not the records requested fall within the exemptions listed in the law.

This booklet, specifically designed for records requesters, addresses the following questions:

What Is A Public Record?

What Are The Exemptions From Disclosure?

How Does A Citizen Gain Access to Public Records?

What Recourse Does A Requester Have When Access To Records Is Denied?

What Fees May Be Charged For Copies Of Public Records?

The examples in this booklet are not intended to be restrictive, but rather, are offered as a general guideline in applying the exemptions.

WHAT IS A PUBLIC RECORD?

"All books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations or other documentary materials or data, regardless of physical form or characteristics..." made or received by state, county and municipal offices are public records, according to the definition provided in G. L. Chapter 4, Section 7, Clause 26. The only exceptions are those records which specifically fall within one of the exemptions detailed in the law.

When a record contains both exempt and non-exempt information, the non-exempt portions are segregated from the exempt portions and can then be disclosed. Since the law presumes that all records are public, the custodian must cite and specify the exemption which applies when denying access.

Records held by the State Legislature or the courts are not subject to the public records law.

WHAT ARE THE EXEMPTIONS FROM DISCLOSURE?

As noted earlier, the exemptions to the public records law are enumerated in Chapter 4, Section 7, Clause 26. We offer, in the following pages, a discussion of the specific exemptions and some examples of where they apply as a means of helping to clarify these important distinctions.

- (a) *Specifically or by necessary implication*
 - *exempted from disclosure by statute*

Certain statutes clearly and specifically exempt a record from disclosure. For example, G.L. Chapter 46, Section 2A prohibits the disclosure of impounded birth records to any persons not legally authorized access. Access is limited to authorized persons only, and therefore exempts these records from disclosure under the public records law. Certain other records are also excluded from disclosure. For example, welfare records, (G.L. Chapter 66, Section 17A), and personal income tax records, (G.L. Chapter 62C, Section 21(a)).

- (b) *Related solely to internal personnel rules and practices of the governmental unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding*

This exemption allows the non-disclosure of governmental operating manuals and guidelines relating only to intra-agency matters which, if disclosed, would significantly impede the fulfillment of the agency's responsibilities. An instructional manual on computer security would fall into this disclosure exemption.

- (c) *Personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy*

The key word in this exemption is, of course, "unwarranted". In applying this exemption, the public's right to know is carefully weighed against the individual's privacy. The record may be withheld only if the extent and seriousness of the invasion of privacy outweighs the public interest. Decisions of the Massachusetts courts cited welfare payments, alcoholic consumption, family fights and reputation as examples of the information which the privacy exemption is designed to protect.

- (d) *Inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this sub-paragraph shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based*

This exemption preserves a degree of confidentiality necessary to the free flow of advice, recommendations and opinions between persons involved in the development of policy. By affording protection to individuals, whose input may be critical to the quality of the policy ultimately established, this provision encourages candid and complete opinions. Factual materials upon which policy positions are being or have been based, are not exempt.

- (e) *Notebooks and other materials prepared by an employee of the Commonwealth which are personal to him and not maintained as part of the files of the government unit*

In this instance, the exemption protects written materials that are not made by an individual in his capacity as a government employee; and therefore are not considered to be a record of the agency. An example would be written information, data, notes or references to personal matters or activities totally unrelated to the office in which the individual is employed. This exemption helps protect those records of a personal nature that an employee may keep in his desk, file cabinet or other place at his work station.

- (f) *Investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest*

This exemption, designed to protect confidential investigative sources, encourages individual citizens to come forward with information and allows law enforcement officials to be candid in recording their investigative observations.

- (g) *Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subparagraph shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit*

Where this exemption allows the private sector to voluntarily provide information, in confidence, to be used in the development of government policy, it does not exempt from disclosure any information filed in compliance with laws or filed in order to receive a benefit from the government. For example, a company may provide certain confidential information vital to the company's interest merely to assist in the formulation of governmental policies. Submitted in confidence, this information may be withheld from disclosure under the public records law. On the other hand, when a company provides data regarding its operations to a government agency in order to secure a contract to do business with the agency, or if such information is required by statute in order that the company may be licensed, the records are public.

- (h) Proposals and bids to enter into any contract or agreement until the time of the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person*

This exemption prevents the premature disclosure of bids or proposals for government contracts for goods or services, for a limited period of time.

- (i) *Appraisals of real property acquired or to be acquired until 1) a final agreement is entered into; or 2) any litigation relative to such appraisal has been terminated; or 3) the time within which to commence such litigation has expired*

This exemption provides government agencies with the same right of confidentiality as is afforded private parties in eminent domain proceedings or any real estate transactions involving a governmental unit.

- (j) *The names and addresses of any persons contained in or referred to in, any applications for any license to carry or possess any firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards*

This exemption is limited to specific data concerning applicants and owners of firearms. It exempts from mandatory public disclosure the names and addresses of individuals found on: applications for firearms licenses; firearms identification cards; and, sales or transfers of the enumerated weapons and their licenses or cards. It does not exempt from public disclosure firearms applications or identity cards in their entirety.

- (k) *That part of the registration or circulation records of every public library which reveals the identity of a borrower.*

This exempts from public disclosure the identity of borrowers contained on a public library's registration or circulation records. It does not operate as an exemption for all of a public library's records.

- (1) *Test questions and answers, scoring keys and sheets, and other examination data used to administer a licensing examination; provided, however, that such materials are used to administer another examination.*

This exemption is limited to state licensing examination materials which are intended for reuse. However, once an exam is no longer to be used for this purpose, it loses its exempt status. This exemption was added to ensure the integrity of tests administered by agencies and boards for licenses.

HOW DOES A CITIZEN GAIN ACCESS TO PUBLIC RECORDS?

Once you have determined which agency or office has the record or records you are seeking, you may request, either orally or in writing, to inspect the record or to be provided with a copy of it. Although the records custodian must either provide access to the records or deny your request within a maximum time period of ten days, the law also states that such access shall be granted without "unreasonable delay."

To be sure of a prompt response, the request should be made for a specific and identifiable record. The records custodian is obligated only to provide a requester with existing records. There is no corresponding obligation of a records custodian to respond to requests for information, which may mean generating a record that does not exist.

WHAT RECOURSE DOES A REQUESTER HAVE WHEN ACCESS TO RECORDS IS DENIED?

If the maximum ten-day period has elapsed and the records custodian has either refused or failed to respond to your records request, you may appeal to the Supervisor of Public Records within ninety days, or directly to the Superior Court. This appeal must be made in writing and must include a copy of the original request to the records custodian, together with a copy of the records custodian's denial letter, if one is issued.

(Because an appeal requires that you furnish a copy of a written request for a record, it is advisable to consider this when making your initial request for access. A good rule of thumb would be that if there is any reason to believe that your request will be denied, then you should make the initial request to the custodian in writing. This will serve as written proof of your request should an appeal be necessary.)

WHAT FEES MAY BE CHARGED FOR COPIES OF PUBLIC RECORDS?

The public records law allows the custodian to charge a reasonable fee. The Supervisor of Public Records has established regulations specifying the fees that may be charged for providing access to public records. Copies of the Public Records Access Regulations, 950 CMR 32.00, are available at local public libraries and the State Bookstore in Boston. Only those costs directly incurred in providing access to public records, (i.e., search, segregation and copying) may be charged to a requester.

A custodian may require a deposit or full payment prior to furnishing copies of public records. A good faith estimate must be provided to a requester where the applicable fees are likely to exceed ten dollars.

FOR MORE INFORMATION...

SUPERVISOR OF PUBLIC RECORDS

Office of the Secretary of State

Division of Public Records

One Ashburton Place, Room 1701

Boston, MA 02108

Telephone: (617) 727-2832

